Supreme Court, U.S.
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No. 96-6

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, A PROFESSIONAL CORPORATION AND BILL V. WILKINSON,

Petitioners,

v.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY L. PULS M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.

Respondents.

RESPONDENT PATHOLOGISTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, Wilkinson and Monaghan and Bill V. Wilkinson, (hereinafter "Petitioners") have made petition for a Writ of Certiorari to this Court on the ground that this case presents an important issue of procedural due process guaranteed by section 1 of the Fourteenth Amendment to the United States Constitution. The Respondents, Jerry L. Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc. and South Utica Pathology Laboratories, Inc., (hereinafter "Respondent Pathologists"), oppose this Court granting the Petition for Writ for all reasons set forth below but primarily on the ground that the Court is without jurisdiction since Petitioners are raising for the first time in the appeal a federal question of procedural due process.

I.

PETITIONERS' FAILURE TO RAISE A FEDERAL QUESTION ON APPEAL IN THE STATE COURT SYSTEM PRECLUDES JURISDICTION IN THIS COURT

As Petitioners' have well explained in their Petition for Writ, the District Court's order of sanctions was appealed to the Oklahoma Supreme Court who assigned the appeal to the Oklahoma Court of Appeals. After that court rendered its decision and declined rehearing, Petitioners filed a Petition for Writ with the State Supreme Court which declined the Writ. For the first time on appeal, Petitioners raise a federal question regarding whether it was a violation of due process for the district judge who ruled on the evidentiary issues at trial to also make a determination regarding the appropriateness of

sanctions against Petitioners. At no time prior to Petitioners' appeal to this Court did they raise a federal question for consideration by the state courts. Consequently, Petitioners have failed to preserve their federal question for consideration by this Court.

The United States Supreme Court has not hesitated to deny Petitions for Writ of Certiorari where a Petitioner has failed to preserve the claim through the appellate process. In the case of *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court granted Certiorari but dismissed the Writ during oral argument when it learned that this was the first instance where Petitioner raised a federal question. In doing so, the Court stated, "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Id.*

> In Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, s. 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368,391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, (citations omitted) and since.[1]

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[1] *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334, 342, n. 7, 79 S. Ct. 1196, 1201, 3 L.Ed.2d 1280 (1959);

In addition, this Court has recognized time and again that there are sound and practical reasons for insisting that federal issues be presented first in the state court system.

> The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

Webb v. Webb, 451 U.S. 493, 500-501 (1981).

State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160-163, 65 S. Ct. 573, 576-577, 89 L.Ed. 812 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 S. Ct. 670, 672-673, 84 L.Ed. 849 (1940); *Whitney v. California*, 274 U.S. 357, 362-363, 47 S. Ct. 641, 643-644, 71 L.Ed. 1095 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201, 19 S. Ct. 379, 380-381, 43 L.Ed. 665 (1899); *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875).

This Court in *Webb, supra,* held that where the Petitioner failed to raise in the state court proceedings her federal claim regarding the Full Faith and Credit Clause, the United States Supreme Court was without jurisdiction in the case. Initially, Petitioner asserted that the federal question had been raised and this assertion was not disputed by Respondent. The Court assumed there would be no jurisdictional problem and therefore, granted certiorari. However, once granted, during briefing, it became apparent that Petitioner never actually raised the federal claim below.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. (citations omitted)

Id. at 496-497. Although Petitioner asserted that she did use the phrase "full faith and credit" at several points in the lower proceedings, this Court held that merely mentioning the full faith and credit clause did not preserve a federal claim under the Federal Constitution. Petitioner never used the phrase "full faith and credit" in the trial proceedings and on appeal never argued the courts failed to reach her federal claim until she petitioned this Court. Consequently, this Court held that the federal question was not properly raised below and that it was without jurisdiction.

In the case of *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988), this Court declined to grant a petition for Writ of Certiorari to review a punitive damage award on the grounds that Petitioner failed to

raise federal due process and contract claims under the Federal Constitution during the appeal in state court. The Court noted that at no time in its appeal to the state supreme court did the appellant raise a federal constitutional challenge to the size of the punitive damage award prior to that court's affirmance of the award. Although in its petition for rehearing, appellant asserted that the punitive damage award violated "due process, equal protection, and other constitutional standards", this was too "vague" and "oblique" to preserve the Contract Clause or due process claims for the United States Supreme Court. In denying the writ, the Court again noted the policy reasons for raising the federal claims in the state appeal identified in *Webb, supra* and the numerous cases before it.

In the case at bar, Petitioners failed to raise in the courts below the federal question raised now; namely, whether the imposition of sanctions by the trial judge is a violation of Petitioners' constitutional rights to due process pursuant to the Fourteenth Amendment of United States Constitution. Not only did Petitioners fail to raise this issue with the trial court, they failed to raise it with the Oklahoma Court of Appeals and Oklahoma Supreme Court. Noticeably absent from the Petition in Error filed by Petitioners in the state court appeal is a Constitutional claim. In the Petition in Error, the appealing party designates the areas of the law that will be raised on appeal. One such area is constitutional law. At no time did Petitioners ever designate a constitutional issue. APP. 8a.[2]

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[2] References to Respondent Pathologists' Appendix, infra, will be designated as APP ___.

Furthermore, as part of the Petition in Error, the appealing party is to attach an exhibit setting forth the proposed issues and errors to be raised on appeal. Although Petitioners raised 53 propositions of error, none of them set forth a constitutional claim or specifically, a claim for violation of due process pursuant to the Fourteenth Amendment. APP 33a-41a.

It is anticipated Petitioners will argue that they raised this issue in the lower court proceedings through their arguments that the trial judge should have recused when Petitioners requested it. However, in accordance with *Webb, supra,* this is insufficient to preserve a federal claim. It is evident that Petitioners in the case at bar are dissatisfied with the conclusion reached by the state courts of appeal and therefore, artfully construed a constitutional issue to gain jurisdiction with this Court. The case law of this Court is clear that Petitioners' failure to raise and preserve the constitutional issue in the state court system leaves this Court without jurisdiction. Therefore, Respondent Pathologists respectfully request that the Petition for Writ of Certiorari be denied.

II.

THE TRIAL JUDGE HAD THE INHERENT AUTHORITY TO ASSESS SANCTIONS AND HIS CONDUCT IN DOING SO WAS NOT VIOLATIVE OF DUE PROCESS

Petitioners argue that a well established line of due process decisions by this Court regarding methods used to adjudicate and assess sanctions are applicable to the issue raised. In making this argument, Petitioners cite to numerous opinions authored by this Court. However, in

reading each of these cases, Respondent Pathologists submit that Petitioners' cited cases are distinguishable from the case at bar and are not authoritative.

Petitioners rely extensively on this Court's decision of *In re Murchison*, 349 U.S. 133 (1955), in their argument that due process requires a neutral adjudicator at all times. In doing so, Petitioners cite numerous quotations from the opinion that stand for the general proposition that a fair trial in a fair tribunal is a fundamental requirement of due process. This is undisputed. However, a careful review of the facts of that case makes it abundantly clear it is inapplicable to the case at bar. In *Murchison*, a Michigan state judge served as a "one man grand jury" consistent with Michigan law. During the secret grand jury proceedings, two witnesses were cited for contempt. Later, the same judge, after a hearing in open court, adjudged these witnesses guilty of contempt and sentenced them to punishment for events that took place before him in the grand jury proceedings. This Court noted it had previously held that a Michigan "judge grand jury" cannot, consistent with due process, summarily convict a witness of contempt for conduct in a secret hearing. "We held that before such a conviction could stand, due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel." *Id.* at 134.

Michigan law expressly prohibits a "one man grand jury" from hearing or trying any case arising from his inquiry or from hearing any charge of contempt except for neglect or refusal to appear in response to a subpoena.

The Court stated that it would be a "strange" system if the law permitted a judge acting as a single grand jury in a secret session to then try the very persons accused as a result of his investigations. "Having been a part of that process, a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137. The Court further notes that there are circumstances when contempt committed in a trial courtroom can be punished summarily by the trial judge. However, the unique facts and circumstances of *In re Murchison* cannot be likened to that situation. In addition, the Court was concerned that the judge conducting the "judge grand jury" may be called as a material witness in a later trial for contempt.

In re Murchison is not applicable to the case at bar for many reasons. First, it is undisputed that Petitioners were given an opportunity to conduct discovery prior to the evidentiary hearing on sanctions as well as examine witnesses called against them, call witnesses in their own behalf and be represented by counsel. Second, the trial judge in the case at bar was not likely to be called as a material witness at the evidentiary hearing and was wholly disinterested in the outcome of the hearing from either a personal or pecuniary standpoint. The trial judge's interest in the outcome of the case was simply one of managing his courtroom. Finally, this was not a secret investigation in which the judge was both gathering evidence and making accusations. Rather, the trial judge was a neutral adjudicator presiding over a two day evidentiary hearing in an open forum whereby Petitioners actively participated with counsel.

Petitioners also rely on the cases of *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) for the proposition that due process requires a truly neutral adjudicator before an individual may be deprived of life, liberty or property. These decisions are also distinguishable from the case at bar. Both *Tumey* and *Ward* are cases arising out of the state of Ohio and stand for the proposition that a court adjudicating a matter in which it has a financial interest in the outcome of the decision is an unfair and partial tribunal prohibited by the Fourteenth Amendment. In both cases, the mayors of the villages tried the cases and rendered decisions convicting the petitioners and assessing a monetary penalty for the offense. Under Ohio law, mayors of villages sitting as courts of justice do not receive any fees unless they convict. The greater the fine assessed by the court, the greater the amount of money which the villages receive. As the executive heads of the villages, the mayors had personal financial interests at stake as well as the financial interests of the villages. Not only did a portion of the fee go into the village treasuries, but the mayors also received a portion of the fee as compensation over and above their salary. The Court noted the general rule that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy. *Tumey* at 522; *Ward* at 60. In both cases, this Court held it was a violation of due process to subject the defendant's " liberty or property to the judgment of a court, the judge of which has a direct, personal substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey* at 523; and *Ward* at 60.

In addition, Petitioners cite to the case of *Aetna Life Insurance Co. v. Lavoie, et al.*, 475 U.S. 813 (1986) for the same proposition. Like *Tumey* and *Ward*, the *Aetna* case also involves a member of the judiciary with a "direct, personal, substantial and pecuniary" stake in the outcome. As a result of the justice's direct pecuniary interest in the outcome of the case, his involvement in deciding the issues was held to be a violation of the Fourteenth Amendment.

The case at bar shares no similarities with *Tumey*, *Ward* or *Aetna*. There is no suggestion by Petitioners that the trial judge had any "direct, personal, substantial or pecuniary" interest in the outcome of the case. The trial judge would not personally profit from his decision regardless of whether or not he assessed sanctions against these Petitioners for their conduct. Consequently, the cases cited by Petitioners are not authority for their proposition that in order to afford them their Due Process rights someone other than the trial judge had to adjudicate the sanction matter.

Petitioners have also relied on several criminal cases in which counsel was cited for contempt by the trial judge. On appeal, the individual facts of those cases showed that the judicial conduct in citing counsel for contempt was inconsistent with Due Process. As previously discussed, neither this Court nor any other court has held that all cases of contempt citation should be heard by a neutral arbitrator as Petitioners contend. Specifically, Petitioners cite to *Taylor v. Hayes*, 418 U.S. 488 (1974) which is distinguishable from the case at bar. In *Taylor*, the trial judge cited counsel on nine separate occasions for contempt. After the jury returned a guilty

verdict, and in front of the jury, the judge proceeded to impose a jail term for each contempt citation. This was done without giving counsel for the accused an opportunity to be heard in defense or mitigation before he was finally adjudged guilty and sentence imposed. This Court found that denying counsel an opportunity to respond to the charges violated the Due Process Clause of the Fourteenth Amendment. There is no similarity between *Taylor* and this case. It is undisputed that Petitioners were allowed to conduct discovery prior to the evidentiary hearing on sanctions and further, were given notice and an opportunity to be heard at a two day hearing. Consequently, *Taylor* is not authoritative.

Petitioners additionally cite to the case of *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) which is also distinguishable from the case at bar. In *Mayberry*, the trial judge and two defendants cited for contempt became personally embroiled in a conflict on more than one occasion during the trial. The defendants made insulting attacks on the integrity of the judge in front of the jury and leveled many fighting words at him. It was found that the trial judge was so cruelly and personally slandered by the defendants that it would make it difficult to "maintain that calm detachment necessary for fair adjudication." There are no similar facts in the case at bar. Petitioners here never cast such personal aspersions at the trial judge or attacked his judicial integrity in such a way that he could no longer be fair in adjudicating the sanctions matter. In *Ungar v. Sarafite*, 376 U.S. 575 (1964) this Court held that a lawyer's challenge, though "disruptive, recalcitrant and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge carrying

such potential for bias as to require disqualification." Respondent Pathologists respectfully submit that Petitioners behavior warranting sanctions was recalcitrant and disagreeable but did not rise to the level of personal insult upon the trial judge sufficient to warrant his disqualification.

Finally, at footnote 7 in Petitioners brief, they cite to the case of *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980), in support of their statement that "it is well accepted that due process limits the imposition of attorney sanctions." However, it is interesting to note *Roadway* is inopposite to Petitioners' argument that the trial judge cannot be not a neutral adjudicator of sanctions and is supportive of the trial judge's conduct in the case at hand. In *Roadway,* two former employees and one unsuccessful job applicant brought a civil rights class action against Roadway claiming employment policies discriminated on the basis of race and asked for equitable relief. The employees failed to cooperate during the course of discovery and Roadway moved to dismiss the suit under FRCP 37 requesting an award of attorney's fees and court costs as sanctions. The District Court criticized the employees for their "deliberate inaction" in handling the case and as sanctions, ordered them to pay Roadway's costs and attorney's fees for the entire lawsuit in an amount in excess of $17,000.

The issue raised on appeal was whether the court had the authority to award attorney's fees under FRCP 37. This Court held that attorney's fees could be assessed for a party's failure to comply with discovery orders. It remanded the case back to the district court for a specific

finding that counsel's conduct constituted or was tantamount to bad faith, a finding that should precede any sanction under the court's inherent powers. In its opinion, this Court noted that it is the inherent power of the courts to "assess attorney's fees for the willful disobedience of a court order . . . as part of the fine to be levied on the defendant." *Id.* at 751. (citations omitted) It further stated that "like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers." *Id.* at 752. It is important to recognize that this case was remanded to the same district judge for further determination in support of his sanctions ruling and at no time does this Court state or even suggest that in order to comply with Due Process, the trial judge should ask a fellow judge to adjudicate the matter.

Moreover, in the case of *Cooter and Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990), this Court held that deference should be given to the trial court who is on the front line of litigation in order to enhance that court's ability to control the litigants before it. This Court stated:

> In directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion. See also Advisory Committee Note on Rule 11, 28 U.S.C. App., p. 576 (suggesting that a district court "has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted").

* * *

> ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous") *Id.* at 400 citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Petitioners have argued that when the trial court weighed the evidence in the case at bar and then some months later undertook to levy sanctions against Petitioners, this action violated Petitioners due process rights to a "neutral adjudicator". However, this Court's decisions of *Roadway* and *Cooter and Gell* are inopposite to Petitioners' argument. These opinions clearly articulate that it is the district court which is in the best position to determine whether sanctions are appropriate since it is most familiar with the pertinent facts.

Several federal circuit courts have similarly held that the trial judge in litigation properly imposed sanctions pursuant to Rule 11. In the case of *Flip Side Productions, Inc. v. JAM Productions Ltd.*, 843 F.2d 1024 (7th Cir. 1980), the Court upheld the trial court's imposition of sanctions under Rule 11, where after the close of discovery it was apparent that its claim against the Defendant was groundless. In so holding, the Court stated:

> Implicit in the District Court's finding is that it imposed sanctions under Rule 11's frivolousness clause because the Court concluded that, once discovery was closed, Flip Side should have known that the facts and the law then known

> clearly established that Tempo had not violated either the anti-trust laws or RICO. As our earlier analysis of Flip Side's essential facility claims demonstrates, the District Court found that, at the close of discovery, Flip Side had failed to produce any evidence that the alleged Tempo-JAM Agreement had given JAM market power in any market . . . At the close of discovery, because Tempo was not implicated in an anti-trust or RICO violation, Flip Side was obligated to dismiss Tempo or suffer the consequences. Flip Side apparently chose the latter, and the District Court, in its discretion, based upon the "actual position" Flip Side took, imposed sanctions. *We hold that under these circumstances, the District Court properly imposed sanctions pursuant to Rule 11.* (Emphasis added)

See also Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); *Advo Systems v. Walters*, 110 F.R.D. 426 (E. D. Mich. 1986); and *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42 (2d Cir. 1988) (all cases in which it was held that the trial court properly imposed sanctions). Although none of these opinions specifically address whether due process rights were violated, each case articulates the opinion that the District court properly awarded sanctions. Implicit in these opinions is the finding that the rulings were consistent with principles of constitutional law.

III.

THE TRIAL COURT HAD THE AUTHORITY TO ASSESS SANCTIONS AGAINST PETITIONERS

In addition to federal law and specifically, the *Roadway* case, Oklahoma law recognizes a trial court's inherent authority to tax costs and necessary expenditures, including attorneys' fees, against a party whose conduct results in the needless expenditure of costs incurred in defending frivolous litigation. In the case of *City Nat'l Bank v. Owens*, 565 P. 2d 4 (Okla. 1977), the Oklahoma Supreme Court acknowleged the trial court's authority to sanction, stating as follows:

> Courts have long recognized that attorney fees may be awarded when an opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons, . . . one of the exceptions to the general rule recognized that common law and in modern practice, it is the court's inherent equitable power to award attorneys' fees regardless of the fact that an award is not authorized by statute or contract, whenever overriding considerations, such as oppressive behavior on the part of a party indicate the need for such recovery. *Id.* at 7, 8.

Also, in the case of *Winters v. City of Oklahoma City*, 740 P. 2d 725 (Okla. 1987), the Oklahoma Supreme Court reaffirmed the trial court's inherent authority to assess as sanctions costs and attorneys' fees against an attorney. In *Winters*, counsel for the plaintiff brought suit alleging liability on the part of the City for injury received by a student at a public school. The City filed a Motion to Dismiss and Application to Assess Attorneys' Fees and Costs against the Plaintiff's attorney, alleging that he had

acted in bad faith in asserting municipal liability for the acts of employees of the school system despite adverse rulings on the same issue in three prior cases. The Oklahoma Supreme Court affirmed the trial court's decision describing the court's inherent authority to sanction as follows:

> The power to levy fees against a party who has litigated in bad faith arises from the court's traditional equitable powers . . . Included among these powers was the power to levy attorneys' fees for bad faith litigation. *Id.* at 726.
>
> * * *
>
> "[I]nherent powers" are those which "are necessary to the exercise of all others". These are the court's inherent powers to manage its own affairs so as to achieve the orderly and timely disposition of cases. These powers are implicit in the existence of a judicial system and are a necessary incident to the exercise of a court's jurisdiction. These powers have been expressed in such practices as the contempt citation, sanctions for abusive litigation such as dismissal for failure to prosecute, and the imposition of attorneys' fees on a party for bad faith litigation. *Id.* at 726, 727.

The trial court in the case at bar appropriately exercised its inherent powers in accordance with the Oklahoma Supreme Court's holding in *Winters*. The history of this case as outlined by the Oklahoma Court of Appeals' Opinion found in Petitioners' Appendix (APP 1a) evidences Petitioners bad-faith and abusive conduct for which the imposition of sanctions is appropriate. The Respondent Pathologists urge this Court to recognize the

trial court's inherent power to control Petitioners' behavior and manage its own affairs through the imposition of sanctions and consequently, deny the Petition for Writ of Certiorari.

IV.

THE INDEPENDENT AND ADEQUATE STATE GROUND DOCTRINE IS INAPPLICABLE

Petitioners argue that the state court refused to adjudicate an issue on appeal on the ground that the allegation of trial error had been waived. Petitioners further contend that the state court's determination of waiver does not constitute an independent and adequate state ground to preclude a determination by this Court. However, this doctrine has no applicability to the case at bar since Petitioners failed to raise any federal question throughout their appeal in the state court system.

Generally, according to this doctrine, the Supreme Court is without jurisdiction to review a state court judgment if that judgment rests on a state ground independent of a federal question. One of the purposes of this doctrine is to prevent a state court's ruling on a state procedural matter from precluding a ruling on a federal question. In other words, a litigant's procedural defaults in state proceedings do not prevent assertion of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.

In support of their contention, Petitioners cite to the case of *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). In *Henry*, the issue was whether the petitioner, upon his failure to timely object to the admission of illegally seized

evidence, had waived his right to a determination of the federal question regarding an alleged unlawful search. The Court found that the state's rule requiring objection to evidence at the time of its introduction clearly did serve a legitimate state interest. But the Court found that this interest might have been substantially served if the state court had taken the opportunity to decide the constitutional issues on the motion for a directed verdict at the close of the state's case. Consequently, this Court remanded the case for a determination as to whether Petitioner had waived the federal claim in question.

In the case at bar, specifically, Petitioners claim that the trial court improperly precluded one of Plaintiffs' expert witnesses from testifying regarding the alleged interrelationship of several corporate entities. In their opinion, the Court of Appeals notes that this allegation has been waived along with several others. "Wilkinson's petition in error sets out fifty-three propositions of error. Wilkinson's brief preserves but one: whether or not the sanctions levied were an abuse of the trial court's discretion." Petitioners' Appendix 6a. See also APP 33a-41a. It has long been the law of this state that propositions of error not outlined in the Petition in Error are deemed waived.[3]

In the case at bar, there never was a federal question presented in the state court system. Consequently, the Oklahoma Court of Appeals' determination that review

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[3] *Hadnot v. Shaw*, 826 P. 2d 978 (Okla. 1992); *American First Abstract Co. v. Western Information Systems, Inc.*, 735 P. 2d 1187 (Okla. 1987); *State ex rel. Remy v. City of Norman*, 642 P. 2d 219 (Okla. 1981); *Peters v. Golden Oil Co.*, 600 P. 2d 330 (Okla. 1979).

of the trial court's evidentiary rulings were waived did not effect a federal question. It naturally follows that in order for the Independent and Adequate State Grounds Doctrine to be applicable, there must be a federal question properly preserved for appellate review. This again is where Petitioners' argument fails. Petitioners failed to raise any federal question prior to their petition to this Court. Consequently, the Oklahoma Court of Appeals' alleged failure to review an issue they deemed waived as a result of Petitioners failure to comply with a state procedural rule does not preserve the issue for this Court's review. As a result, this doctrine has no applicability to the case at bar.

CONCLUSION

Petitioners failure to properly preserve their alleged federal question by raising it in the state court system precludes jurisdiction in this Court. There is a long line of Supreme Court cases which articulate the importance of adjudicating the federal question throughout the appeal rather than raising it for the first time with this Court. Consequently, the Petition for Writ of Certiorari should be denied for lack of jurisdiction. However, in the event the Court looks beyond the jurisdictional issue to the substantive issues, Petitioners have failed to state a claim for consideration. The trial court exercised its inherent authority to manage its affairs and control its courtroom in assessing sanctions. As evidenced by case law, trial courts time and again exercise this power where warranted without constitutional violation. Petitioners have failed to present either authority or evidence to establish

that the case at bar was so unique that they required an adjudicator other than the trial judge. Consequently, Respondent Pathologists respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Attorneys for Respondent Pathologists

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Personal Representatives of the Estate of Norma Levitt, deceased, Plaintiffs/Appellees v. HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC., Defendants/Appellees	No. CJ-90-3403 No. CJ-91-2677 Consolidated March 20, 1992 S. Ct. No. ___

MERLE LEVITT, WILLA WARNER and LINDA JONES,

Plaintiffs/Appellees

v.

HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC.,

Defendants/Appellees

and

WILKINSON AND MONAGHAN, A Professional Corporation, and BILL V. WILKINSON,

Appellants.

PETITION IN ERROR
(AND PRELIMINARY STATEMENT)

_X_ PETITION IN ERROR ___ CROSS-PETITION

___ AMENDED PETITION ___ COUNTER-PETITION

If the petition is an amended petition, state purpose of amendment. N/A.

If the petition is a cross-petition or counter-petition, state the date that the original petition in error in the appeal was filed with the Clerk of this Court. ___N/A_____

Type of Case in Supreme Court:
(Check one)

_X_ Judgment or final Order of District Court (Rule 1.10)
___ Corp. Commission (Oil & Gas) (Rule 1.85)
___ Corp. Commission (Utility) (Rule 1.85)
___ Insurance Dept. (Rule 1.55)
___ Tax Commission (Rule 1.25)
___ Court of Tax Review (Rule 1.140)
___ Banking board or Commissioner (Rule 1.155)
___ Other _____
(Explain)

A. TRIAL COURT HISTORY

COURT/TRIBUNAL:	District Court of Tulsa County
COUNTY:	Tulsa County
CASE NO.:	No. CJ-90-3403 and No. CJ-91-2677 (Consolidated March 20, 1992)
JUDGE:	David L. Peterson

DATE JUDGMENT OR ORDER APPEALED PRONOUNCED: April 11, 1994.

DATE THE JUDGMENT OR ORDER WAS FILED: April 11, 1994.

WAS APPELLANT OR APPELLANT'S ATTORNEY PRESENT WHEN THE JUDGMENT OR ORDER WAS PRONOUNCED? ___ Yes _X_ No

WAS A PARTY OR CLERK DIRECTED TO MAIL A COPY OF THE JUDGMENT OR ORDER TO THE APPELLANT? _X_ Yes ___ No

IF MAILING A COPY OF THE JUDGMENT OR ORDER WAS DIRECTED DOES THE TRIAL COURT RECORD SHOW THAT THE JUDGMENT OR ORDER WAS MAILED TO THE APPELLANT WITHIN FIVE (5) DAYS OF THE DATE THE JUDGMENT OR ORDER WAS FILED? _X_ Yes ___ No

IF MAILING WAS ORDERED, ON WHAT DATE WAS THE ORDER MAILED TO THE APPELLANT?

BY DISTRICT COURT CLERK: APRIL 11, 1994.
(Date mailed)

BY OTHER PARTIES:

1.	_____ Date mailed.	_____ Name of party who mailed the order.
2.	_____	_____
	_____	_____

POST-TRIAL MOTION?

	Type and Authority	Date Filed in Trial Court
1.	_____	_____
2.	_____	_____
3.	_____	_____

DATE OF DISPOSITION OF POST-TRIAL MOTION OR MOTIONS.

	Type	Date Disposed in Trial Court
1.	_____	_____
2.	_____	_____
3.	_____	_____

B. DISPOSITION IN TRIAL COURT OR TRIBUNAL

NATURE OF JUDGMENT OR ORDER APPELLANT SEEKS TO REVERSE:

Two Orders were entered on April 11, 1994, which Appellant seeks to reverse:

(1) Order on Attorney's Lien: Denial of Appellant's costs and attorneys fees under attorney fee contract.

(2) Findings of Fact and Conclusions of Law: Award of costs and attorney fees as sanctions against Appellant.

RELIEF SOUGHT BY APPELLANT IN TRIAL COURT OR TRIBUNAL:

Appellant sought an award of costs and attorney fees pursuant to attorney fee contract against Appellees in a separate suit, Case No.

CJ-93-02879 (the "lien foreclosure case"). Appellant did not file its attorney's lien in this action. However, the Trial Court entered its Order on Attorney's Lien, adjudicating Appellant's rights in the lien foreclosure case in this action.

In a separate order on the same day the Trial Court granted applications by Appellees and invoked sanctions against Appellant.

RELIEF GRANTED BY TRIAL COURT OR TRIBUNAL:

Order substantially denying Appellant's rights under its Attorney's Lien.

Order invoking sanctions against Appellant.

RELIEF SOUGHT BY APPELLEE IN TRIAL COURT OR TRIBUNAL:

Appellee sought costs and attorneys fees as sanctions against Appellant in the trial court.

Appellee sought determination that Appellant's attorney lien contract was invalid.

RELIEF GRANTED BY TRIAL COURT OR TRIBUNAL:

Application for costs and attorney fees as sanctions against Appellant granted.

Judicial determination that attorney lien contract is invalid.

JUDGMENT ON LESS THAN ALL CLAIMS OR PARTIES.

DID THE TRIAL COURT ADJUDICATE LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED? ___ Yes _X_ No. IF SO, DID THE TRIAL COURT MAKE AN EXPRESS DETERMINATION THAT LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED SHOULD BE

DECIDED AND EXPRESSLY DIRECT THE FILING OF A FINAL JUDGMENT? ___ Yes _X_ No

EXHIBIT "A" attached. (Two Orders)

C. SUMMARY OF CASE

Exhibit "B" attached.

D. ISSUES AND ERROR8 PROPOSED TO BE RAISED ON APPEAL

Exhibit "C" attached.

ANY RELATED OR PRIOR APPEALS:

_X_ Yes ___ No

If so, identify by style, citation if any, and Supreme Court Number.

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Plaintiffs/Appellees v. HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC., Defendants/Appellees, MERLE

LEVITT, WILLA WARNER and LINDA JONES, Plaintiffs/Appellees v. HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC., Defendants/Appellees; and WILKINSON AND MONAGHAN, A Professional Corporation, and BILL V. WILKINSON, Appellants. No. CJ-90-3403 and No. CJ-91-2677, Consolidated March 20, 1992; S. Ct. No. 82,685.

Court Reporters' estimate of number of transcribed pages: 6,700.

CHECK THE APPLICABLE ISSUES INVOLVED IN THE APPEAL:

___	01	Administrative Law and Procedure
___	02	Appeal and Error
X	03	Attorneys
___	04	Bankruptcy
___	05	Banks and Banking
___	06	Bond Forfeitures
___	07	U.C.C.
___	08	Constitutional Law
X	09	Contracts

___	10	Corporation Commission
___	11	Corporations & Partnerships
X	12	Courts
X	13	Damages
___	14	Estates, Trusts, & Guardianships
___	15	Family Law
___	16	Insurance
___	17	Labor Law
___	18	Manufacturer's & Products Liability
___	19	Oil & Gas Law
X	20	Procedure
___	21	Property Law
___	22	Schools & School Districts
___	23	Taxation
X	24	Torts
___	25	(No number 25)
___	26	Water Law
___	27	Government
___	28	42 U.S.C. § 1983
___	29	Jurisdiction & Venue
___	30	Elections/Initiative Petns.
___	31	Prisoners
___	32	Arbitration
___	33	Securities
___	34	Consumer Law
___	35	Patents & Trademarks
___	36	Indian Law
___	37	Municipal Law
___	38	Governmental Tort Claims Act
___	39	Garnishment & Execution
___	40	Discovery
___	41	Licenses
X	42	Evidence
___	43.	Guaranty & Suretyships
X	44	Liens, Mortgages & Notes
___	45	Interest

List by general topic as set forth above any other issues involved in this appeal: 12 O.S. § 2011 Sanctions.

E. ALL APPELLANTS MUST SHOW HOW THE APPEAL IS TIMELY BROUGHT

Place an "X" in the appropriate category the appellant is relying on to show a timely appeal.

I. JUDGMENTS AND FINAL ORDERS OF THE DISTRICT COURT

THE APPEAL FROM THE JUDGMENT OR FINAL ORDER HEREIN IS TIMELY BROUGHT BECAUSE:

1. THE PETITION IN ERROR WAS DELIVERED TO THE CLERK OF THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE JUDGMENT OR FINAL ORDER WAS:

   X A. FILED WITH THE DISTRICT COURT CLERK, OR

   ___ B. MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

2. THE PETITION IN ERROR WAS MAILED TO THE CLERK OF THE SUPREME COURT BY U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED ON _____, AND THE STATED DATE OF MAILING WAS WITHIN THIRTY DAYS OF:

   ___ A. THE DATE THE JUDGMENT WAS FILED WITH THE DISTRICT COURT CLERK, OR

___ B. THE DATE THE JUDGMENT WAS MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

3. _____

_____

_____.

II. FINAL ORDERS OF OTHER TRIBUNALS

THE APPEAL HEREIN IS FROM A FINAL ORDER OF THE _____. (Corporation Commission, Insurance Department, Tax Commission, Court of Tax Review, Banking Board or Banking Commissioner, etc.)

THE APPEAL HEREIN IS PROSECUTED UNDER THE AUTHORITY OF: Rules of Appellate Procedure in civil cases.

THE APPEAL HEREIN IS TIMELY BROUGHT BECAUSE:

X A. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IN ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS RENDERED OR PRONOUNCED AND THE PETITION IN ERROR WAS:

___ 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on ___. AND The stated date of mailing was within thirty days of the date the order was rendered or pronounced. OR

X 2. Delivered to the Office of the Clerk of the Supreme Court for filing within thirty days of the date the order was rendered or pronounced. OR

___ B. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IN ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS MAILED TO THE APPELLANT AND THE PETITION IN ERROR WAS:

___ 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on ___. AND The stated date of mailing was within thirty days of the date the order was mailed to the appellant. OR

___ 2. Delivered to the Office of the Clerk of the Supreme Court for filing within thirty days of the date the order was mailed to the appellant. OR

___ C. _____
_____
_____
_____.

F. IS APPELLANT WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY?

___ Yes X No

G. IS APPELLANT AGREEABLE TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER COURT RULE?

X Yes ___ No

H. NAME OF COUNSEL
(With telephone number and address)

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Name: Bill V. Wilkinson
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ATTORNEY FOR APPELLEES:

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Name: W. C. Sellers
Firm: W. C. Sellers
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Telephone: 918-224-5357

Name: Joe Best
Firm: Best, Sharp, et al
Address: 100 W. 5th, #808
Tulsa, OK 74103
Telephone: 918-582-1234

I. DATE May 10, 1994 **Verified by:**

/s/ Bill Wilkinson
Name: Bill V. Wilkinson
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Name: Murray E. Abowitz
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Telephone: 405-236-4645

J. AFFIDAVIT OF MAILING TO APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT

I hereby certify that a true and correct copy of the above and foregoing Petition in Error was mailed this 9th day of May, 1994, to the following by depositing in the U.S. Mails, postage prepaid:

Michael W. Hill
Secrest & Hill
Suite 900, 7134 South Yale
Tulsa, Oklahoma 74136

John R. Paul
9 East Fourth, Suite 400
Tulsa, Oklahoma 74103;

Michael P. Atkinson
525 South Main, Suite 1500
Tulsa, Oklahoma 74103

Stephen J. Rodolf
2700 Mid-Continent Tower
401 South Boston
Tulsa, OK 74103

W. C. Sellers
600 S. Main
Sapulpa, Oklahoma 74067

Joseph M. Best
Suite 808, 100 West 5th
Tulsa, OK 74103

I further certify that a true and correct copy of the above and foregoing Petition in Error was filed in the Office of the Court Clerk of Tulsa County, on the 9th day of May, 1994.

/s/ Bill Wilkinson
Bill V. Wilkinson

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, et al. Plaintiffs, v. **HILLCREST MEDICAL CENTER**, et al., Defendants.	)	No. CJ-90-3403
and **MERLE LEVITT**, et al. Plaintiffs, v. **HILLCREST MEDICAL CENTER**, et al. Defendants.	)	NO. CJ-91-2677 (Filed Apr. 11, 1994) CONSOLIDATED 3/20/92

ORDER ON ATTORNEY'S LIEN

In the above-styled cases the Court finds as follows:

1. That Bill V. Wilkinson and his law firm were discharged by these clients for good cause after Mr. Wilkinson lost the case.

2. Mr. Wilkinson's Fee Agreement contract appears to be against public policy and contrary to the intent of the Oklahoma statutes and stated that if no recovery was made, there would be no attorney's fee owed. Settlement in this matter was achieved by a different law firm hired by the clients after Wilkinson was discharged. Simply staying within the four corners of the document shows

that neither Mr. Wilkinson or his law firm should have any fee.

3. During the hearings on sanctions March 29-30, 1994, more than one defense attorney present during the trial accused Mr. Wilkinson of negligence and incompetence in his conduct of the case.

4. These accusations were neither rebutted nor denied by Mr. Wilkinson and are therefore deemed to be admitted.

5. Mr. Wilkinson during the trial failed to either understand or follow the standard rules of evidence or the rules of proper attorney conduct.

6. The case was settled because of the expertise of the Sellers Law Firm and because the Court had under advisement a motion for new trial based on incompetent representation.

7. It would be improper to grant fees under the circumstances in this case.

8. That the fact of the case being initially filed with court costs and service fees on four defendants paid may have been of some benefit and should therefore be reimbursed.

9. The finding of an expert such as Dr. Zuck and obtaining his opinion *may*? have been of assistance to the Sellers' Law Firm.

THEREFORE, this Court finds that this order is a complete determination of the attorney's lien rights applied for by Mr. Wilkinson; that such a determination serves as Res Judicata to Case No. CJ-93-2879, which is

redundant and should be dismissed. Mr. Wilkinson seems to forget that he *lost* the case. Further, that the funds on deposit with the Creek County Probate Court may be disbursed to the clients by the Probate Court in its discretion and that the initial court costs ($184.00) should be paid to Mr. Bill V. Wilkinson, as well as the monies expended for Dr. Zuck ($17,394.00).

/s/ David L. Peterson
DAVID L. PETERSON,
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of April, 1994, I mailed a true and correct copy of the above and foregoing to the following with sufficient postage thereon fully prepaid:

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GARY W. DAVIS
20 N. Broadway,
Suite 1800
Oklahoma City, OK 73102

SALLY HOWE-SMITH,
COURT CLERK

/s/ Marianne Moffett
Marianne Moffett,
Deputy Court Clerk

IN THE DISTRICT COURT IN
AND FOR TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER,** a corporation, et al., Defendants. and **MERLE LEVITT,** et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER,** a corporation, et al., Defendants.	No. CJ-90-3403 (Consolidated with CJ-91-2677) (Filed Apr. 11, 1994)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the order of the Court entered on January 18, 1994, this matter came on for hearing at 9:30 a.m. on the 29th day of March, 1994 and continued through March 30, 1994 on the motions of the Defendants Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation Hillcrest Service Company, Hillcrest Real Estate, Inc. (hereinafter referred to as Hillcrest Entities), Dr. Gary Breipohl, M.D., Dr. Jonathan Anthony, M.D., Dr. Robert Spohr, M.D., Dr. Thomas Singletary, M.D., Dr. Harold Voss, M.D., Dr. Dan Wiesemeyer, M.D., Dr. Duane

Brothers, M.D., (hereinafter referred to as Anesthesiologists), and Dr. Frederick Jones, M.D., (hereinafter referred to as Jones) and Dr. Douglas Hubner, M.D., Dr. Jerry Puls, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology (hereinafter referred to as Pathologists), for sanctions against Bill V. Wilkinson, personally and the law firm of Wilkinson & Monaghan.

The Court, having reviewed the pleadings and briefs filed in said cause, heard the sworn testimony of witness and the arguments of counsel, being fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

The above named Defendants were joined as party defendants on or about November 8, 1991, by the filing of an Amended Complaint signed by Mr. Bill V. Wilkinson, individually and on behalf of the law firm of Wilkinson & Monaghan.

II.

During the pretrial proceedings the Hillcrest Entities filed a Motion for Summary Judgment based on the fact that they did not control the methods for providing medical services for patients of Hillcrest medical Center, and were not otherwise liable. Mr. Bill W. Wilkinson continually assured the Court there would be evidence of legally responsible control. During pretrial proceedings the Pathologists, Fred Jones and the Anesthesiologists made

numerous oral motions for summary judgment and requests for dismissal on the grounds that there had been no evidence adduced during discovery which would justify the Court submitting these Defendants to the jury.

III.

During the pretrial procedures the Court advised Mr. Bill V. Wilkinson on several occasions, including the pretrial conference, that he should evaluate and re-examine his allegation against the above-named Defendants, that lawsuits are a traumatic experience to all parties and their families, and he should dismiss those against whom he had no viable case to submit to the jury. The Court further advised Mr. Bill V. Wilkinson that his failure to so do might result in sanctions. The Court denied summary judgment to the Hillcrest Entities on the basis of an affidavit from Dianne Miller Hardy whose testimony Mr. Wilkinson assured the Court, would make the requisite link between the Hillcrest Entities and the allegations in his Amended Complaint. Mr. Wilkinson never called Dianne Miller Hardy to testify.

IV.

The trial of this case ran from April 20, 1993 until May 18, 1993, a period of twenty-one days, despite assurances it would be two weeks or less.

V.

At the conclusion of the evidence on behalf of the Plaintiff in said cause, the Court sustained demurrers and

dismissed the Hillcrest Entities, the Pathologists, Dr. Fred Jones, and all of the moving Anesthesiologists, with the exception of Dr. Thomas Singletary, M.D. At the conclusion of all the evidence, the Court sustained a Motion for Directed Verdict on behalf of Dr. Thomas Singletary, M.D. and dismissed him from the lawsuit.

VI.

The jury returned a verdict for the four remaining Defendants, Hillcrest Medical Center, Chris Jones, C.R.N.A., Dr. Robert Morton, M.D. and Tulsa Anesthesiologists, Inc. At that time the Court dismissed the companion case (CJ-91-2677) because no viable claims remained.

VII.

Subsequent to the trial of said cause, the Hillcrest Entities, Anesthesiologists, Jones and Pathologists each filed motions for sanctions and costs predicated upon the violation of 12 O.S. 1991 §2011 by Mr. Bill V. Wilkinson and the law firm. Said motions were set for hearing and heard by the Court on March 29 and March 30, 1994.

VIII.

The Hillcrest Entities presented expert testimony that their joinder as party defendants was in violation of 12 O.S. 1991 §2011, as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the

law firm failed to produce any evidence that the Hillcrest Entities were involved in providing medical care and treatment to Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the action pursuant to the admonitions and pleading of the trial court amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless and tremendous increase in the cost and time of litigation. The Hillcrest Entities presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

IX.

The Pathologists presented evidence that Mr. Bill V. Wilkinson and the law firm were guilty of violation of 12 O.S. 1991 §2011 as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson testified under oath in response to Pathologists' attorneys that prior to joining them as party defendants he did not contact or consult with any pathologist to ascertain whether the alleged conduct of Pathologists was below the standard of care. Furthermore, the evidence adduced at the hearing showed that at the close of discovery, not one of Plaintiffs' experts had testified in deposition that the Pathologists acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law

firm to dismiss the Pathologists from the action, pursuant to the admonition and pleading of the trial judge, amounted to harassment of these doctors, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation. The Pathologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, and said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

X.

The Anesthesiologists presented expert testimony that they had no involvement in the care and treatment of Norma Levitt, and their joinder as party defendants was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence that the moving Anesthesiologists were involved in the care and treatment of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the present action, pursuant to admonition and pleading of the trial court, amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and resulted in a needless increase in the cost and time of litigation. The Anesthesiologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other related costs, said testimony further established that the

attorney fees charged were in conformity with the usual charges in the Tulsa area.

XI.

Dr. Frederick Jones presented expert testimony that his joinder as a party defendant was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against him were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence at the trial that Dr. Frederick Jones violated the standard of care in the treatment which he rendered to Norma Levitt. The failure of Mr. Bill V. Wilkinson and the law firm to dismiss Dr. Frederick Jones from the action pursuant to the admonition and pleading of the trial court, amounted to harassment of Dr. Frederick Jones, caused unnecessary delays in discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation, particularly as to Dr. Frederick Jones. Dr. Frederick Jones further presented expert testimony as to the reasonable necessity of costs incurred by way of attorney fees and other costs. Said testimony further established that the attorney fees charged were in conformity with the usual charges in Tulsa County.

XII.

Mr. Bill V. Wilkinson and the law firm failed to meet their burden of proof in opposing the Defendants' motions for sanctions by wholly failing to reveal what, if any, evidence was accumulated prior to the time that the

Amended Petition was filed or during discovery in respect to the liability for each Hillcrest Entity. Instead, Mr. Bill V. Wilkinson merely attempted to demonstrate that the Court was mistaken on certain evidentiary rulings during the trial, as based on his "interpretation," and that but for those rulings, the "evidence" would have come in. The Court is still left to speculate whether the required "evidence" ever existed and the exact nature of the "evidence." The focus of the authorities and argument of Mr. Bill V. Wilkinson was totally misdirected and nonsensical. Again, the fact that evidentiary rulings were made, even if adverse to his unique understanding of the rules of evidence, does not preclude Mr. Bill V. Wilkinson from now revealing to the Court the precise evidence he accumulated to meet the requirements of 12 O.S. §2011 and to establish liability. Mr. Wilkinson still fails to understand that the separate act of each defendant must be shown to create liability for any of them.

XIII.

The Court finds that neither Mr. Bill V. Wilkinson nor the law firm offered any sworn testimony at the trial in 1993 or at the sanctions hearings on March 29 and March 30, 1994 in opposition to the reasonableness of the attorney fees offered on behalf of the Hillcrest Entities, Pathologists, Anesthesiologists, and Dr. Frederick Jones or on behalf of his cross-claim for sanctions.

CONCLUSIONS OF LAW

Any finding of fact which should be designated as a conclusion of law is hereby denominated as a conclusion of law.

I.

The Court finds that the Hillcrest Entities, Pathologists and Anesthesiologists are the proper parties to seek sanctions. *Sassower v. Field*, 138 F.R.D. 369 (S.D. New York 1991). 12 O.S. 1991 §2017 mirrors Federal Rule 17(a); therefore federal decisions interpreting Rule 17 and the law applicable thereto are persuasive authority under Oklahoma law. *First Life Assurance Company v. Mountain*, 848 P.2d 117 (Okl. App. 1993).

II.

The signature of an attorney of party constitutes a certificate by him that he has read the pleading, motion, or other paper, and that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well-grounded in fact and warranted by existing law. The signing of the Amended Petition, Response to Motion for Summary Judgment, and Pre-Trial Order by Mr. Wilkinson in this case constitutes such a certificate.

III.

12 O.S. Section 2011 imposes an affirmative obligation upon litigants to stop and think before initially making legal or factual contentions; Section 2011 also imposes a duty to refrain from continuing to advocate a position

or prosecute a claim which has ceased to have any merit or after it becomes clear the claim has no merit; Section 2011 also mandatorily requires the Court to apply sanctions when warranted.

IV.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the Court must, to the extent possible, limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the Court, and then only in extraordinary circumstances. Rule 11, *Advisory Committee Notes*, 1983 Amendment. As a matter of law, the discovery conducted by Mr. Wilkinson was appropriate under the circumstances, but the additional discovery requests and pending Motions to Compel and Motion to Inspect would not be in compliance with the Rule, and are overruled.

V.

The failure of Mr. Bill V. Wilkinson and the law firm to conduct a reasonable investigation or to produce any competent evidence which was well grounded in fact or warranted by existing law establishing the liability of the moving Defendants in this case, despite his continually disputed assurance that he would do so, constituted bad faith and oppressive behavior and is sanctionable under 12 O.S. 1991 §2011. *Winters v. City of Oklahoma City*, 740 P.2d 724, 728 n. 22 (Okl. 1987).

VI.

The Court is not at liberty to disregard undisputed evidence and must accept the same as true. The undisputed evidence offered on behalf of the Hillcrest Entities, Jones, Pathologists and Anesthesiologists regarding the violation of 12 O.S. 1991 §2011 and the testimonial evidence regarding the reasonableness of the attorney fees must be accepted as true. *Thomas v. Thomas,* 565 P.2d 722 (Okl. App. 1976).

VII.

The Hillcrest Entities, Jones Pathologists and Anesthesiologists have met their burden of proof in support of their Motion for Sanctions, and the Court concludes that sanctions in the form of attorney fees and costs should be imposed against Mr. Bill V. Wilkinson personally, and against his interest within the law firm of Wilkinson & Monaghan. *Unit Petroleum Company v. Nuex Corporation,* 807 P.2d 251 (Ok. 1991), and that his counter-claim should be denied.

The combined amount of the sanctions of over $710,000 that was requested is easily justifiable under the extreme and frivolous and malicious circumstances in this case and was reasonably and fairly calculated by all of the defendants. However, the Court must also consider other factors which include deterrence, ability to pay, *history,* bad faith, malice, severity, et cetera, and sanctions should not be used to drive an attorney out of practice or take the place of bar discipline. *White v. General Motors Corporation, Inc.,* 908 F.2d 675 (10th Cir. 1990). Therefore, considering all of the above criteria, the Court finds that

Defendants Hillcrest Health Care Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company, Hillcrest Real Estate, Inc., Dr. Gary Breipohl, Dr. Jonathan Anthony, Dr. Robert Spohr, Dr. Thomas Singletary, Dr. Harold Voss, Dr. Dan Wiesemeyer, Dr. Duane Brothers, Dr. Frederick Jones, Dr. Douglas Hubner, Dr. Jerry Puls individually, Jerry L. Puls, M.D. Inc., and South Utica Pathology should each be awarded $12,500 of their respective fees and costs as sanctions against Mr. Bill V. Wilkinson and his interest only in the law firm.

Since this Court is not aware of Mr. Wilkinson's net worth and does not desire to cause undue harm to his family or his practice, the Court would consider reducing these amounts if furnished a complete CPA certified accounting of his assets, liabilities, and net worth, if this accounting is furnished within 15 days. If the accounting is not furnished, then execution may issue on the above amounts after 15 days has expired.

/s/ David L. Peterson
DAVID L. PETERSON
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of April, 1994, I mailed a true and correct copy of the above and foregoing to the following with sufficient postage thereon fully prepaid:

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P. O. Box 1046
Pryor, OK 74362

SALLY HOWE-SMITH,
COURT CLERK

/s/ Marianne Moffett
Marianne Moffett,
Deputy Court Clerk

EXHIBIT "B"

SUMMARY OF CASE

Appellant law firm formerly represented the plaintiffs in this tort action. Following an unsuccessful trial the law firm was discharged. Shortly thereafter the law firm filed a separate civil case (CJ-93-02879) to foreclose its attorney lien for fees and costs. The Defendants and the new Plaintiffs' attorneys settled around the law firm. The Trial Judge entered an order on April 11, 1994, finding that the attorney fee contract was invalid. The law firm now appeals this determination and final order.

Following the trial, several Defendants filed applications for sanctions against Bill V. Wilkinson and Wilkinson & Monaghan, Inc. under 12 O.S. § 2011. On April 11, 1994, the Trial Court issued another order which granted these applications and invoked sanctions against the law firm. The law firm now appeals this determination and final order.

EXHIBIT "C"

ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

The Trial Judge committed error by failing or refusing to do the following:

1. To recuse or disqualify as the judge in determining the Application for Sanctions and for costs and fees considering the nature and background of the case.

2. To rule on or consider the law firm's Application to Strike and/or Motion to Dismiss and Motion for Summary Judgment and brief.

3. To conduct a hearing on the law firm's Application to Strike and/or Motion to Dismiss and Motion for Summary Judgment even though the Court entered a minute order setting the application and motions for hearing.

4. To require the Defendants seeking sanctions to respond to the law firm's Motion for Summary Judgment as required by Rule 13.

5. To grant the law firm's first and second motions to compel discovery.

6. To grant the law firm's request for a scheduling order and a pretrial conference prior to the trial.

7. To grant the law firm's application to inspect letters and records allegedly provided by Defendants to the Court for "In Camera" inspection.

8. To permit the law firm to depose the Plaintiffs.

9. To grant the law firm's application for extension of time to respond to Chris Jones' Motion for Summary Judgment.

10. To grant the law firm's application for continuance of the trial for sanctions, fees and costs.

11. To grant the law firm's application to stay adjudication or further proceedings regarding sanctions against the law firm.

The Trial Court committed the following errors in the trial on March 29 and March 30, 1994:

12. In failing to apply an objective standard so as to determine and consider whether a reasonable and competent attorney would believe in the merits of the arguments and claims asserted.

13. In permitting the Defendants to prosecute their sanction claims on the basis of alleged negligence even though their answers to interrogatories denied that these claims were based in negligence and over the objection of the law firm.

14. In denying the law firm's demurrers and motions to dismiss because the proof introduced by Defendants did not establish claims against the law firm under 12 O.S. § 2011.

15. In accepting evidence over the objections of the law firm and in failing to strike the same evidence regarding attorney fees and costs when the law firm established through cross-examination that the Defendants either could not or would not separately identify fees and costs resulting solely from the specific actions complained of in their applications.

16. In failing to require the Defendants to meet their burden of proof in establishing their allegations for sanctions under 12 O.S. § 2011 in accordance with Oklahoma law.

17. In imposing a burden of proof on the law firm with regard to the claims by the Defendants under 12 O.S. § 2011.

18. In relying on the Court's earlier rulings made during the jury trial of the tort claims wherein the Court erroneously dismissed these Defendants by granting

demurrers and/or sustaining motions to dismiss, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

19. In determining that there was no evidence showing that there was a reasonable basis to believe that the allegations made against these Defendants were well grounded in fact, or warranted by existing law.

20. In determining that the law firm was required under Oklahoma law to prove that the Hillcrest Entities provided medical care and treatment to Norma Levitt as a prerequisite for liability, and that sanctions should be awarded against the law firm because of such determination.

21. In determining that the failure of the law firm to voluntarily dismiss the Defendants pursuant to admonitions of the Trial Court amounted to harassment, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

22. In determining that the actions of the law firm caused unnecessary delays in the discovery and trial of this case, thereby warranting the imposition of sanctions under 12 O.S. 2011.

23. In determining that the actions of the law firm caused a needless increase in the cost and time of litigation, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

24. In determining that the law firm was required to contact or consult a pathologist regarding the claims against these defendant pathologists, thereby warranting the imposition of sanctions under 12 O.S. § 2011. This

determination falsely assumes that an expert cannot be qualified to testify and prove acts or omissions against a pathologist defendant unless the expert is a pathologist and/or that the law firm could not have conducted a proper investigation without first consulting with a pathologist.

25. In determining that not one of the Plaintiff's experts had testified in deposition that the pathologist defendants acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt, and that such determination warranted the imposition of sanctions against the law firm under 12 O.S. § 2011.

26. In determining that it was a necessary prerequisite to establish that the pathology defendants were directly involved in the care and treatment of patient Norma Levitt, and that the law firm had failed to produce any evidence of this nature, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

27. In determining that the law firm failed to meet its burden of proof, as defined by the Court, in opposing the applications for sanctions, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

28. In determining that the law firm failed to address and/or reveal evidence was accumulated prior to the time that the Amended Petition was filed or during discovery involving the claims against these Defendants, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

29. In determining that the Court is still left to speculate whether the required evidence ever existed and the exact nature of the evidence supporting the claims against these Defendants, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 204.

30. In determining that the proper criteria to be applied in the adjudication of the sanctions applications is the consideration of evidence accepted by the Trial Court during the trial, or that the law firm has the burden of proof in the sanctions application trial to offer additional proof involving the evidentiary errors committed by the Trial Court during the jury trial and that the law firm has failed to meet this burden, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

31. In determining that Mr. Wilkinson still fails to understand that the separate act of each defendant must be shown to create liability for any of them, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

32. In determining that neither Mr. Bill V. Wilkinson nor the law firm offered any sworn testimony at the trial in 1993 or at the sanctions hearings on March 29 and March 30, 1994, in opposition to the reasonableness of the attorney fees offered on behalf of the Hillcrest Entities, Pathologists, Anesthesiologists, and Dr. Frederick Jones, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

33. In determining that these Defendants are the proper parties and the real parties in interest under 12

O.S. § 2017(A) to claim attorney fees and costs against the law firm in the sanctions applications.

34. In determining that discovery attempted by the law firm should be limited in scope, as was done by the Trial Court, and that Rule 11 controls the Trial Court's interpretation of the law firm's rights of discovery in this matter.

35. In determining that the actions of the law firm in this matter constitute bad faith and oppressive behavior and are, therefore, sanctionable under 12 O.S. § 2011.

36. In determining that the claims asserted by these Defendants in the trial of the application for sanctions were undisputed, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

37. In denying the law firm's counter-claim.

38. In determining that these Defendants who filed applications for sanctions should be awarded the sum of $12,500 each for their respective fees and costs as sanctions against the law firm.

39. In failing to limit the award for fees and costs, if any, in accordance with 23 O.S. § 103.

40. In determining that execution may issue against the law firm even though no judgment has been entered as required by law.

The Presiding Judge committed error with regard to his ruling on April 14, 1994, as follows:

41. In failing to permit the law firm to present evidence in support of their application to disqualify the Trial Judge.

42. In determining that the law firm had not complied with Rule 15(a).

43. In failing to disqualify the Trial Judge.

The Trial Judge committed error in the written order of April 11, 1994, designated as "Order on Attorney's Lien" as follows:

44. The Trial Judge had previously entered an order on April 8, 1994, transferring Case No. CJ-93-2879 back to Judge Wiseman, and no longer had jurisdiction or venue over that case which involves the attorney's lien and fees and costs.

45. The Trial Judge determined that his findings of April 11, 1994, are res judicata to Case No. CJ-93-2879, even though he no longer has jurisdiction in such case, and even though the minute order of April 8, 1994, indicates he will be a witness in Case CJ-93-2879.

46. The determination that the fee agreement contract appears to be against public policy and contrary to the interest of the Oklahoma statutes.

47. The determination that the law firm should be deprived of any fee.

48. The determination that accusations of negligence and incompetence during the trial were neither rebutted nor denied.

49. The determination that Mr. Wilkinson during the trial failed to either understand or follow the standard rules of evidence or the rules of proper attorney conduct.

50. The determination that the case was settled because of the expertise of the Sellers Law Firm and because the Court had under advisement a motion for new trial based on incompetent representation.

51. The determination that it would be improper to grant fees under the circumstances in this case.

52. The determination that the funds on deposit with the Creek County Probate Court may be disbursed to the clients by the Probate Court in its discretion and that the initial court costs ($184.00) should be paid to Mr. Bill V. Wilkinson, as well as the monies expended for Dr. Zuck ($17,394.00).

53. The determination that Bill V. Wilkinson and his law firm were discharged by these clients for good cause.